MAR 29 1956
HAROLD B. WILLEY, C

In the

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1955

No. 807

ORVAL CARR,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

CHARLES HILL JOHNS,
312 Colcord Building,
Oklahoma City, Oklahoma;

GOMER SMITH, JR.,
312 Colcord Building,
Oklahoma City, Oklahoma,

Attorneys for Petitioner.

March 28, 1956.

LITTLEBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-6750

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statutes Involved	3
Statement of the Case	3
Facts	5
Reasons for Granting the Writ	6
Conclusion	8

AUTHORITIES

CASES:

Boyd v. U. S., 116 U.S. 616	7
Taylor v. U. S., 286 U.S. 1	7
Trupiano v. U. S., 334 U.S. 699	7

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendments IV and V	2-3, 7

STATUTES:

Title 26, U.S.C.A., Secs. 2803, 3321, 2913	3
Title 28, U.S.C., Sec. 1254 (1)	2

INDEX CONTINUED PAGE

APPENDIX

Appendix A:

Opinion of the United States Court of Appeals for the Tenth Circuit, filed February 28, 1956 i

Appendix B:

Judgment and Order of Probation of the United States District Court for the Western District of Oklahoma, filed June 22, 1955 vii

Appendix C:

Statutes Involved, Set Out in Full viii

In the

Supreme Court of the United States

NOVEMBER TERM, 1955

No. .....

ORVAL CARE,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Orval Care, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on February 28, 1956.

OPINION BELOW

The case is reported in — F.2d — and is printed in Appendix A, *infra.*

JURISDICTION

The judgment sought to be reviewed was rendered and entered on February 28, 1956.

On March 9, 1956, an Order of the United States Court of Appeals, Tenth Circuit, was entered staying the mandate of the said Court for a period of thirty (30) days from February 28, 1956.

Jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254(1) (Appendix C).

QUESTIONS PRESENTED

1. The decision of the Court of Appeals, Tenth Circuit, limiting the protection of the Fourth Amendment to structures within the curtilage of an accused's home is in conflict with decisions of this Court.

2. The decision of the Court of Appeals, Tenth Circuit, in holding that the evidence in this case was legally obtained, and its failure to order the supression of said evidence, is in conflict with the decisions of this Court requiring a search warrant for the valid search of a stationary structure, where a reasonable opportunity to secure a warrant is shown.

CONSTITUTIONAL PROVISIONS INVOLVED

"AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S.C.A. Const. Amend. IV.

"AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.C.A. Const. Amend. V.

STATUTES INVOLVED

Title 26, U.S.C.A., Secs. 2803, 3321, and 2913: Possession of nontaxpaid spirits; removing and concealing nontaxpaid spirits with intent to defraud; and removing and concealing nontaxpaid spirits in a place other than a bonded warehouse.

The full text of applicable portions of these statutes is quoted in Appendix C., *infra*.

STATEMENT OF THE CASE

Petitioner was convicted upon a plea of "Not Guilty" and finding of "Guilty" by the District Court of the United States, Western District of Oklahoma on each of six (6) counts of the indictment for the offense of violations of Sections 2803, 3321, and 2913, Title 26, U.S.C.A. (two counts on each offense).

A copy of the Judgment and Order of Probation of the United States District Court for the Western District of Oklahoma is set out as Appendix B, hereto attached.

Petitioner appealed from the conviction and sentence (five years suspended) and alleges that the evidence upon

which he was convicted should have been suppressed upon petitioner's timely Motion, because such evidence was obtained by means of an illegal search and seizure in violation of petitioner's rights, protections, and immunities guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

Trial by jury was waived and the case submitted to the trial judge upon evidence produced on hearing of the Motion to Suppress and upon stipulations of additional facts (R. 6-9).

As stated by the Circuit Court (Appendix A), "The denial of the Motion to Suppress is crucial; for without the evidence secured in the search, the conviction cannot stand."

The search complained of was of a cave located in a two and one-half (2½) to four (4) acre mesh wire, hog-tight enclosure just back of petitioner's home.

Petitioner contends, first: That the cave was a stationary structure, even though below ground, and that a search warrant is a necessary prerequisite to a valid search of a stationary structure, even though there is probable cause to believe the structure is being used in violation of the law, where the search is not incident to an arrest and where there is a reasonably adequate opportunity to obtain a search warrant.

And second: That the search and seizure complained of was within the curtilage of petitioner's home, and required a search warrant on this additional ground.

The Circuit Court failed to consider the first grounds set out above and, in their opinion, sought to dispose of the case by holding that the cave was not within the curtilage.

Appellant asserts that the court erred in failing to consider and pass on his contention that a search warrant is a necessary prerequisite to search a stationary structure even though outside the curtilage, when there is an adequate opportunity to obtain a search warrant.

FACTS

The evidence shows that the so-called cave, as referred to in the Opinion of the Circuit Court, was actually a permanent man-made structure; that it was constructed in a ditch but that it had a heavy beamed ceiling, was totally closed at the lower end and was closed at the upper end by two heavy railroad car doors.

The evidence further shows that it was wired with electricity and electric lines, contained a water pump, a gasoline tank, a large gasoline burner, and other equipment commonly used in still. Petitioner claimed all of the articles found within the structure but denied that there was any whiskey located in the structure at the time of the search.

The uncontradicted evidence further shows that the Alcohol Tax Unit Agents of the Government, who conducted the search complained of, had had petitioner's premises under suspicion for many weeks. On November 15, 1954, they went to petitioner's ranch and searched a large portion of his ranch for a still. Petitioner was at home at that time. The Alcohol Tax Unit Agents claim that he granted permission to search at that time. Petitioner de-

nies that he gave permission to search his premises then or at any other time. The officers spent several hours looking over much of petitioner's ranch on November 15, 1954, but they did not complete the search.

The Alcohol Tax Unit Agents returned to the area in which petitioner's ranch is located on December 3, 1954. That evening they found 695 gallons of whiskey in a plum thicket on a tract of land that adjoins petitioner's ranch.

On the morning of December 4, 1954, they returned to petitioner's ranch home without a warrant. They discovered that neither petitioner nor any one else was upon the premises. They then proceeded to search a two and one-half (2½) to four (4) acre hog-tight, mesh wire fence just behind petitioner's home and discovered therein what the Government terms a cave, and petitioner asserts is a permanent structure. No one was in or about this cave or structure. It could not be seen into nor entered without removing the heavy doors at its upper end. The Government concedes that it was not a still set up or in operation. It is conceded that if a search warrant was necessary the Government's case failed.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in sustaining the trial court's action in denying petitioner's Motion to Suppress and in limiting the protections of the Fourth Amend-

ment to the curtilage of an accused's home is in conflict with the following authorities.

—*Taylor* v. *U.S.*, 286 U.S. 1;

Trupiano v. *U.S.*, 334 U.S. 699;

United States Constitution, Amendment IV.

The decisions in the above cited cases are not limited by considerations of curtilage.

The intimate relation between the Fourth and Fifth Amendments of the United States Constitution is well established. *Boyd* v. *U. S.*, 116 U.S. 616.

The facts in this case show that the Alcohol Tax Unit Agents had ample and reasonably adequate opportunity to obtain a search warrant but failed to do so. The search complained of was not made incident to an arrest or under any grave emergency, but was made while petitioner and his entire family were absent from the premises.

The facts in this case call for the application of the Rules of Law as set out in the above decisions. The protection of the Fourth Amendment extended to the stationary structure or "cave" searched. Evidence secured by a search, without a valid search warrant, of a stationary structure, upon petitioner's ranch should have been suppressed. The failure of the Circuit Court to so hold is in conflict with the cases cited, *supra*.

Petitioner asserts that his Constitutional rights and immunities guaranteed by the Fourth and Fifth Amendments to the United States Constitution have been violated by an illegal search, and a failure to suppress evidence so

obtained. The decision of the Circuit Court, of which review is sought, is in conflict with applicable decisions of the Supreme Court of the United States concerning an important question of Federal Law, namely, the extent and scope of the protections afforded a citizen by the Fourth Amendment to the Constitution of the United States. A clear pronouncement by this Court that the protections of the Fourth Amendment against unreasonable search and seizure extend to a stationary structure, unlimited by consideration of curtilage, and clearly defining the protections afforded by said Amendment would eliminate confusion and conflicting interpretations of the protection afforded by the Fourth Amendment and is necessary for the protection of petitioner's constitutional rights.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

CHARLES HILL JOHNS,
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Oklahoma City, Oklahoma;

GOMER SMITH, JR.,
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Oklahoma City, Oklahoma,

Attorneys for Petitioner.

March 28, 1956.

I hereby certify that on the 28th day of March 1956, I mailed two copies of the Petition, postage pre-paid to the Solicitor General of the United States at his office in Washington, D.C., and a copy, postage pre-paid to Mr. Paul W. Cress, United States Attorney, Oklahoma City, Oklahoma.

CHARLES HILL JOHNS.

APPENDIX

Appendix A.

United States Court of Appeals

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
FEB 28 1956
Robert B. Cartwright
Clerk

No. 5239—November Term, 1955

ORVAL CARE, Appellant,	)	Appeal from the United States District Court for the Western District of Oklahoma.
vs.	)	
UNITED STATES OF AMERICA, Appellee.	)	

Gomer Smith, Jr. for appellant.

George Camp, Assistant U. S. Attorney (Paul W. Cress, U. S. Attorney, was with him on the brief) for appellee.

Before BRATTON and HUXMAN, Circuit Judges, and MELLOTT, District Judge.

MELLOTT, District Judge.

[APPENDIX]

Appellant,[1] following an extended hearing on his motion to suppress evidence alleged to have been obtained by means of an illegal search and seizure, after denial of the motion, waived trial by jury upon the charges contained in a six-count indictment[2] and submitted the issues to the court upon the evidence adduced at the hearing on the motion. He was found guilty on each count, placed on probation for five years and appealed.

The denial of the motion to suppress is crucial; for without the evidence secured in the search, the conviction cannot stand. The trial court found that none of defendant's constitutional rights had been violated in the search of a cave on his farm; that, although made without a warrant, it had been with the express consent of the defendant; that in any event the cave had been used as a distillery, separate, apart and distinct from his home; and that it was not within the curtilage. The correctness of this holding is the only issue presented.

The evidence consisted of the testimony of an agent of the Alcohol and Tobacco Unit, United States Treasury Department, called as witness on behalf of defendant, the testimony of the defendant and a plat or diagram of the premises not drawn to scale. Many of the basic facts were stipulated. Collectively, the record tends to establish these facts:

Defendant operated a ranch in Ellis County, Oklahoma, consisting of approximately 1320 acres of land with residence, barn, granary, shop, chicken house, fences and other improvements thereon. One hundred twenty acres of the

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1. Hereinafter defendant.

2. The offenses charged were violations of Title 26 U.S. C.A., §§ 2803, 3321 and 2913: Possession of nontaxpaid spirits; removing and concealing nontaxpaid spirits with intent to defraud; and removing and concealing nontaxpaid spirits in a place other than a bonded warehouse.

ranch were owned by him, and the buildings, including the cave, were located on this tract. In November, 1954, agents of the Alcohol and Tobacco Unit had received information leading them to believe a still was being operated on the premises. On November 15, 1954, the agent who was later called by the defendant as a witness and two other agents went to the ranch and found defendant and others engaged in cutting wood about 250 yards from the house. After identifying themselves and stating their mission to be to find the still, if one existed, the defendant told them "to go ahead and search all * * * [they] wanted to." The partial search made on that day did not result in locating any still or nontaxpaid spirits. It had been interrupted before being completed when the agents had been called by radio to go elsewhere on another matter. The residence and other buildings were not searched and the agents did not have a search warrant.

On December 3, 1954, 695 gallons of nontaxpaid whiskey and other property had been found by the government agents in a plum thicket approximately half a mile away from the buildings "on the end of some of the property that * * * [defendant] had something to do with."[3] The next day the agents went to defendant's home for the purpose of asking him about the whiskey; but no one was there. Looking northwest from the house, across a roadway, one of the agents decided to inspect a plowed field of from 2-½ to 4 acres, inclosed in a mesh wire, hog-tight fence, while others looked elsewhere about the ranch in search of a still. They had no search warrant at that time; but they did not search the house, barn or other buildings mentioned above. They construed the permission given them on November 15, 1954, to be authorization to search

3. The quotation is from the testimony of the Alcohol Tax agent. While the record is not entirely clear, it seems the plum thicket was on land rented to a brother of defendant who lived in Woodward, Oklahoma.

the portion of the ranch which they had not searched previously.

The property concededly within the curtilage is almost surrounded by roads. The road runs generally southwest to the vicinity of the barn south of the house, turns to the northwest and circles the house, shop and granary, after which it turns again generally southwest. Across the road and to the west of the shop and house was the plowed field referred to in the preceding paragraph. Near the far side of this field was a ditch, several feet in depth. At some undisclosed time, heavy timbers had been laid across the ditch and covered with dirt. It was level with, or slightly below, the surrounding area. The entrance to the inclosure thus made had been closed with two panels of grain doors placed upright in the ditch; but they were not visible from the road or house. The cave was approximately 125 yards west or northwest of the house. The agent started walking across the plowed field following a pig trail. After walking some distance, an odor of mash was detected, the cave was discovered and entered, and an elaborate whiskey making outfit and 3-½ gallons of nontaxpaid whiskey were discovered. Subsequent investigation established that electric current from the house was being conducted to the cave through a buried electric cable, although overhead wires supplied current to the other buildings.

Defendant denied any ownership or knowledge of the 695 gallons of whiskey found in the plum thicket but admitted the ownership "of all items and property seized on his ranch in the shed or cave to the rear of his home." As to the "alleged 3 ½ gallons of whiskey seized in said shed or cave," he denied that it was whiskey and that it had the alcohol content stated by the government agents. It was further stipulated that "there was not a still 'set-up' * * * in the cave or shed * * * but that all the parts of a complete still, except the cooker and doubler, were found either in

said shed or cave * * * or in the plum thicket where the 695 gallons were discovered * * *."[4]

Defendant testified that he had built the inclosure, which he characterized as a "hog feeding outfit," some three or four years previously and used it for the purpose of soaking grain to be fed to his pigs and hogs. He also testified that he and his family had sometimes used it as a storm cellar. His evidence did not convince the trial court that the cave was within the curtilage nor are we persuaded by it. In that view we find it unnecessary to determine whether the permission to make the search, given on November 15, 1954, carried with it permission to continue the search more than two weeks later.

The applicable legal principles are well established and extended discussion of them would serve no useful purpose. As this court has stated, "the protection of the Fourth Amendment securing people in their persons, houses, papers and effects against unreasonable search and seizure does not apply to an open field."[5] It does, however, apply to buildings within the curtilage, which may include a garage,[6] a barn,[7] a smokehouse,[8] a chicken house[9] or similar prop-

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4. The quotations in this paragraph are from the stipulations.
5. *Edwards* v. *United States* (10 Cir.) 206 F.2d 855, 856, citing *Hester* v. *United States*, 265 U.S. 57, 59, 44 S.Ct. 445, 68 L.Ed. 898; cf. *Martin* v. *United States* (5 Cir.) 155 F.2d 503, 505; *Dulek* v. *United States* (6 Cir.), 16 F.2d 275; *Stark* v. *United States* (8 Cir.) 44 F.2d 946, 948.
6. *Taylor* v. *United States*, 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed. 951.
7. *Walker* v. *United States* (5 Cir.) 225 F.2d 447.
8. *Roberson* v. *United States* (6 Cir.) 165 F.2d 752.
9. *Walker* v. *United States* (5 Cir.) 125 F.2d 395.

erty. Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family.[10]

The cave in the instant case was in a plowed field, across a road and more than a long city block from the home. It gave no evidence of ever having been used as a refuge from storms or for normal uses of a cave adjacent to a home such as the storage of foods or dairy products. The trial court chose to disbelieve the testimony of the defendant "that it was used for a storm cave," or for the primary purpose of feeding hogs, stating: "the evidence points conclusively to the fact it was used as a distillery, * * * separate and apart and distinct from his home as one could be." As indicated above, we are not persuaded that the trial court erred in reaching its conclusion that the cave was not within the curtilage. The search has not been shown to have been within the proscription of the amendment relied upon. The evidence was therefore properly admitted. Since no question is raised as to its sufficiency to support the judgment, the conviction will not be set aside.

AFFIRMED.

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10. 25 C.J.S. p. 65.

APPENDIX B

Judgment and Order of Probation of the United States District Court for the Western District of Oklahoma:

JUDGMENT AND ORDER OF PROBATION

On this 22nd day of June, 1955, came the attorney for the government and the defendant appeared in person, and by Gomer Smith, Esq., his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and finding of guilty by the Court on each six counts of the indictment of the offenses of Violation of Sections 2803, 3321, and 2913, Title 26, U.S. C.A. (Possession of nontaxpaid spirits, removing and concealing nontaxpaid spirits with intent to defraud, removing and concealing nontaxpaid spirits in a place other than a bonded warehouse) as charged in each 6 counts of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged the imposition of sentence is hereby suspended on each six counts of the indictment, and the defendant is placed on probation for a period of five (5) years from this date.

It Is Ordered that the bond of defendant be exonerated.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver two certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

Stephen S. Chandler, Jr.
United States District Judge.

Filed June 22, 1955.

APPENDIX C

Title 28, Section 1254 (1) U. S. C. A. provides:

"Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following method:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Title 26, Section 3321 (a) U. S. C. A. provides:

"Sec. 3321. Removal or concealment with intent to defraud the revenue.

"(a) Penalty. Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both." 53 Stat. 401.

Title 26, Section 2913 U. S. C. A. provides:

"Sec. 2913. Penalty for unlawful removal or concealment of spirits.

"Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years." 53 Stat. 345.

Title 26, Section 2803 (a) and (g) U. S. C. A. provide:

"Sec. 2803. Stamps for containers of distilled spirits.

"(a) Requirement. No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this section shall not apply to—

(1) Distilled spirits placed in a container for immediate consumption on the premises or for preparation for such consumption;

(2) Distilled spirits in bond or in customs custody;

(3) Distilled spirits in immediate containers required to be stamped under existing law;

(4) Distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(5) Distilled spirits on which no internal-revenue tax is required to be paid;

(6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; or

(7) Any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

* * * * * * * * *

"(g) Penalties. Any person who violates any provision of this section, or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under this section, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by this section, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by this section, or who places any distilled spirits in any bottle which has been filled and stamped under this section without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under this section to any container of distilled spirits on which any tax due is unpaid, or who makes any false statement in any application for stamps under this section, or who has in his possession any such stamps obtained by him otherwise than as provided in subsection (b), shall on conviction be punished by a

fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. Any officer authorized to enforce any provisions of law relating to internal revenue stamps is authorized to enforce the provisions of this section and the provisions of section 2909 relating to the bottling of distilled spirits in bond. 53 Stat. 303."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Campbell v. *United States*, 151 F. 2d 605	9
Hester v. *United States*, 265 U.S. 57	7
Taylor v. *United States*, 286 U.S. 1	8
Trupiano v. *United States*, 334 U.S. 799	8

Statutes:

26 U.S.C. 2803	2
26 U.S.C. 2913	2
26 U.S.C. 3321	2

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 807

ORVAL CARE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i-vi) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 28, 1956 (Pet. App. i-vi). The petition for a writ of certiorari was filed on March 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether nontaxpaid liquor and illicit distilling apparatus was obtained by an unlawful search when officers entered a concealed reinforced cave, separated from petitioner's dwelling house by a plowed field, a fence, and a road, for a total distance of over 125 yards.

2. Whether, in any event, the search was authorized by permission to search granted by petitioner 20 days before, the search having then been pursued for several hours and interrupted by the calling away of the officers on another assignment.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Tenth Circuit affirming the judgment of the District Court for the Western District of Oklahoma finding petitioner guilty (upon plea of not guilty, and trial before the court without a jury (R. 4, 12, 60)) of possession of nontaxpaid spirits (Counts I and IV), removing and concealing nontaxpaid spirits with intent to defraud (Counts II and V), and removing and concealing nontaxpaid spirits in a place other than a bonded warehouse (Counts III and VI), in violation of 26 U.S.C. 2803, 3321, and 2913 (R. 1-4, 9-10).[1] Sentence was suspended and petitioner was placed on probation for five years (R. 9-10).

The evidence may be summarized as follows:

On November 15, 1954, officers of the Alcohol and Tobacco Tax Unit of the United States Treas-

[1] Counts I, II, and III relate to 695 gallons, Counts IV, V, and VI to three and one-half gallons.

ury Department went to petitioner's ranch upon complaint that there was a still on the ranch (R. 16, 21-22, 24). Officer Nay, called as a witness by petitioner (R. 15), testified that he apprised petitioner of the complaint, and that (R. 22):

> [Petitioner] said, "Well, all right, if you can find it." I talked to him about searching the place and he told me to go ahead and search all I wanted to. * * *

Officer Akers, it was stipulated, would have given substantially the same testimony as Nay (R. 7). Petitioner testified, to the contrary, that he did not grant permission to search (R. 57). The trial judge found the fact to be that the permission was granted (R. 61).

The search proceeded for several hours over a great deal of the property (R. 21, 24) but was interrupted by the calling of the agents to another assignment (R. 24, 32). On December 3, 1954, the agents found 695 gallons of whiskey in a thicket on land adjoining petitioner's ranch, about a mile and a quarter east of petitioner's house, together with some of the parts for a still (R. 7, 32). The land was leased to petitioner's brother but the brother did not live there, and petitioner tended the brother's cattle on the land (R. 33-35, 53). Petitioner denied ownership or knowledge of the whiskey (R. 8).

On the following day, December 4, 1954, agents Nay and Akers returned to petitioner's ranch to complete the interrupted search and to obtain pe-

titioner's explanation of the 695 gallons of liquor and parts for a still (R. 32-33). They found no one at home. They made no search of the home or nearby buildings (R. 26, 41). Akers went along a road in the car and Nay left the house, proceeded down from the bluff upon which the house was situated (R. 18-19, 30), crossed a public road, and entered a freshly plowed field of two and one-half or three acres, separated from the house not only by the height of the bluff and by the road but by a mesh wire fence enclosing the field (R. 18, 28, 30, 38-40, 47, 50). He followed a small trail to a creek (R. 20, 28). His attention was caught by a thistle or tumbleweed on a flat piece of ground standing in a manner that "just looked out of place" (R. 28). Approaching the thistle, Nay noticed an odor of mash, and upon picking up the thistle he discovered that it had covered a square, boarded hole going down into a cave (R. 28). The cave had been made in a natural ditch, some 125 yards northwest of the house (R. 17), by widening the ditch, covering the space with heavy timbers, and sodding over the top so that it would be the same level as the top of the ditch and "absolutely indistinguishable from anywhere" (R. 28-30). One end of the cave was closed off with grain doors ordinarily used to close freight cars and covered up with thistles (R. 28, 29).

The cave contained elaborate equipment for making whiskey, together with a stack of 10, 15, 30, and 40 gallon kegs similar to those found with the 695 gallon cache. There were numerous in-

dications of use, and the parts in the cave together with parts found with the 695 gallons of whiskey (which fitted the coil in the cave) lacked only a cooker and doubler to constitute all the component parts of a still (R. 8, 31, 41-45). Three and one-half gallons of "moonshine whiskey" were found in a jug in the cave (R. 7, 47-48), together with a quart of colored whiskey (R. 42, 44). Petitioner stipulated to ownership of the equipment in the cave, but denied that the three and one-half gallons of liquor were whiskey and denied the 53.4 proof alcohol content (R. 8, 23, 46, 57).

Electric current was conducted to the cave by a buried wire, which the officers traced to a point behind the garage by reason of the little depression made in laying the wire. The officers traced it no further but later learned from petitioner that the connection continued on to the house (R. 20-21, 46). Light wires for petitioner's chicken house, barn, and shop were not thus concealed, but were on poles (R. 40-41).

At the trial, petitioner pleaded not guilty (R. 12) and moved, *inter alia,* for suppression of evidence obtained by search "within the curtilage of his home" (R. 4). In support of the motion, petitioner called Nay as his witness (R. 15) and himself gave testimony—limited to the question of curtilage (R. 48)—to the effect that his children, now 21 and 18 and living away from home, once played in the fenced-in acreage, that he kept farm machinery and equipment in it (although not at that time), that the cave and its equipment was

used for soaking grain to be fed pigs, and that the cave was used as a refuge "if it is storming bad" (R. 49-52, 56). He stated that the road separating the house from the field below was not a public road (R. 51). Upon examination by the trial judge, petitioner admitted that the fenced-in field had been plowed for the purpose of sowing for pasture (R. 52), and that any pig troughs were on the house side of the field and not connected with the cave, but twenty-five yards across the field from it, "maybe a little farther" (R. 54-55).

The district court overruled the motion to suppress evidence, finding that the cave was used only as a distillery, "separate and apart and distinct from [petitioner's] home as one could be." He also found that petitioner had authorized the agent to search, and that the search was made "in the exercise of that authority given to him by this defendant" (R. 6, 58).

The Court of Appeals observed that petitioner's evidence had failed to convince the district court that the cave was within the curtilage, "nor are we persuaded by it." (Pet. App. v-vi). In that view the Court of Appeals found it unnecessary to consider the issue of permission to search (Pet. App. v).

ARGUMENT

1. The cave here involved, far from being any part of petitioner's house or domestic group of buildings, was essentially only the widened part of a creek or ditch bed, covered over with beams and carefully camouflaged to appear flush with the

ground. While petitioner at the trial sought to term it a "shed" or "feed house" (R. 8, 16, 20, 23, 41), the evidence shows that he had done everything possible to keep it apart from his home and to conceal it. The cave was within an enclosure of some two and a half to three acres of plowed field fenced off from the house, and separated by a public road, and by a steep incline to the bluff upon which petitioner's house was situated. The cave was over 125 yards from the house and no amount of reference at the trial to the plowed area as a "back yard" or "rear of his home" (R. 8, 24, 35-36, 50, 52) could transform this open field into any semblance of a curtilage. Even the sole connection with the house—the wire for electric power—was concealed underground, as distinguished from the open connections on poles to the barn, chicken house, and shop.

The trial judge and the Court of Appeals were clearly under no misapprehension of the law in appraising the specific facts of the case. They were aware of, and adverted to, the considerations that would have been involved had buildings truly within the curtilage been searched (R. 14-15, 59; Pet. App. v-vi), but they were equally aware of the different principle laid down by this Court in the case of a search over an open field. This Court long ago pointed out that the constitutional protection of a person in his home does not create an unlimited extension off into space, preventing any and all investigations not related to the home itself. *Hester* v. *United States*, 265 U. S. 57, 59.

The case of *Taylor* v. *United States*, 286 U. S. 1, to which petitioner alludes (Pet. 7), was clearly within the cognizance of the court below, but the search there was of a garage "adjacent to the dwelling," on a city lot (286 U. S. at 5).[2]

Petitioner's efforts to evoke some connection between his home and the cave in a creek bed were properly discounted. Petitioner argued that the field had in the past been a play area for his children, but they admittedly were then 18 and 21 years of age and both living away from the farm. Petitioner further urged that the distilling equipment was for soaking feed for pigs, but there were only a few pigs visible on the farm (R. 47), and the placement of the pig troughs clearly negated the claimed use of the cave as a source of feed (see *supra*, p. 6). The contention that the fenced field served as a place to store larger equipment was negatived by the fact that no equipment appeared in the field. Similarly slender were the efforts to bring the dugout into connection with the house as a storm refuge and to urge that the road separating the plowed field from the house was a private and not public road because it was obstructed, at points, by gates rather than ordinary cattle guards. The trial judge—who had petitioner before him and could personally evaluate the credibility of petitioner's statements—found that:

[2] *Trupiano* v. *United States*, 334 U.S. 699, cited by petitioner (Pet. 7), dealt only with the issue as to whether the search, under the facts of that case, was a proper incident to arrest. It may be observed, however, that the subject of the midnight raid there involved was a barn.

> [A]t the time this cave was searched, it was out in the field, a plowed field, and I don't believe his testimony at all that it was used for a storm cave and all of the evidence points conclusively to the fact it was used as a distillery, which I believe it was, and it was a distillery separate and apart and distinct from his home as one could be * * * [R. 57-58].
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> * * * * *
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> [I]t was just a very skillful way of hiding a large distillery, and the wires even, the electric wires, were even buried so there would be no indication that there was electricity out there. * * * [R. 61.]

2. The trial judge also found that petitioner, several weeks before, had given the federal officers permission to search. The fact of this permission and its coverage of the later continuation of the search were clearly matters upon which the trial judge was in the best position to evaluate the government testimony as against that of petitioner. The judge did not believe the petitioner. While the Court of Appeals, in sustaining the judgment, found it unnecessary to pass upon the matter of permission, the finding of the trial judge remains in full force and is, we submit, itself dispositive of petitioner's contentions. *Campbell* v. *United States*, 151 F. 2d 605 (C.A. 6).

CONCLUSION

The decision below is a proper application of established principles to a particular factual situation. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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